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IN THE

Supreme Court of the United States

October Term, 1961.

No. 101.

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit.

BRIEF FOR PETITIONER.

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International Printing Co., Inc., Phila., Pa.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit (R. 103-20) are reported at 288 F.2d 579. The opinion of the United States District Court for the Southern District of New York (R. 60-66) is found at 175 F. Supp. 793. The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 25-45) is found at 169 F. Supp. 677.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 21, 1961 and the petition for writ of certiorari was filed on May 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED.

Section 1406(a) of 28 U.S.C. provides as follows:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Section 12 of the Clayton Act, 38 Stat. 736, 15 U.S.C. § 22 provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

QUESTION PRESENTED.

In a private antitrust action instituted by petitioner in the Eastern District of Pennsylvania, the District Court determined that venue was improper as to the defendant-respondents, and pursuant to 28 U.S.C. § 1406(a) severed and transferred the action as to them to the Southern District of New York where venue was proper.

The District Court for the Southern District of New York dismissed the action as against respondents for lack of jurisdiction upon the ground that the District Court for the Eastern District of Pennsylvania did not have personal jurisdiction over them and, therefore, had no power to

order the transfer. The Court of Appeals for the Second Circuit affirmed.

Did the District Court for the Eastern District of Pennsylvania, which had jurisdiction over the subject matter of the present action, have the power to transfer the case for improper venue under 28 U.S.C. § 1406(a), without having obtained personal jurisdiction over the transferred respondents?

STATEMENT OF THE CASE.

This is a private antitrust action brought pursuant to Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, against Jacob Shubert and several other persons and corporations identified with the Shubert interests in the legitimate theatre business. Petitioner, which operates a legitimate theatre in the City of Philadelphia, alleged injury to its business as a result of defendant's nation-wide monopoly and conspiracy unreasonably to restrain commerce in the legitimate theatre business, and sought treble damages and an injunction (R. 13-17).[1] The action was instituted by petitioner in the District Court for the Eastern District of Pennsylvania on October 17, 1956, within one year after the entry of the Consent Decree in *United States v. Shubert*, Civil Action 56-72, District Court for the Southern District of New York (1956 Trade Cases ¶ 68, 272), in order to secure the benefits of Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), providing for the tolling of the statute of limitations during the pendency of a Government antitrust action.

Service was originally made upon all defendants at the Shubert's Philadelphia office (R. 18-19). Subsequently, re-

1. A second complaint with almost identical allegations, but which added certain defendants not here involved and extended the period for which damages were sought, was filed on February 18, 1957 (R. 21-25). At the same time, petitioner amended the original complaint to assert the extended damage period. The two actions were consolidated in the Southern District of New York after transfer (R. 97), and will be treated as one case for the purpose of this Brief.

spondents Select Operating Corporation and United Booking Office, Inc. were also served in New York City by means of alias summonses, as provided by Section 12 of the Clayton Act, 15 U.S.C. § 22 (R. 19-20).

Respondents, as well as other defendants, filed motions to dismiss the present action for lack of jurisdiction and for improper venue, and to quash the return of service, claiming that they resided and transacted business only in New York City. The District Court for the Eastern District of Pennsylvania denied the motions as to some of the defendants, but as to respondents and others it held that venue in the Eastern District of Pennsylvania was improper under Sections 4 and 12 of the Clayton Act, 15 U.S.C. § 15 and 22, upon the grounds that these defendants (a) did not reside, (b) have agents, or (c) transact business in the Eastern District of Pennsylvania (R. 25-45).

However, instead of dismissing the case against these defendants, the District Court for the Eastern District of Pennsylvania, "in the interest of justice", transferred the present action as against them to the Southern District of New York, pursuant to Section 1406(a) of the Judicial Code (R. 46-47).

After transfer was effected, respondents once again moved to dismiss the present action for lack of jurisdiction (R. 68-69).[2] On January 27, 1960 the District Court for

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2. At the same time, petitioner moved to substitute as defendants the Executors of the Estate of Marcus Heiman (R. 59-60). The latter had died while the District Court for the Eastern District of Pennsylvania was considering the motions to dismiss.

Both courts below held that the District Court for the Eastern District of Pennsylvania had no power to transfer the case as to Marcus Heiman as well as the corporate respondents. They also held that the said Executors could not be substituted pursuant to the Federal Rule of Civil Procedure 25(a)(1). Petitioner did not seek review of this latter holding.

The remaining transferred defendants, Sylvia W. Golde, Milton Shubert and William Klein did not move to dismiss the present action and it is pending against them in the District Court for the Southern District of New York.

the Southern District of New York granted the said motion, holding that the respondents were not properly served while the case was pending in the Eastern District of Pennsylvania and that, therefore, the said District Court had no power to transfer the case (R. 60-67). The Court of Appeals for the Second Circuit affirmed (R. 103-20).[3] Circuit Judge Moore wrote the majority opinion, with Circuit Judge Waterman concurring; Circuit Judge Hincks dissented.

A writ of certiorari to the Court of Appeals for the Second Circuit was applied for upon the grounds that the decision of the Court of Appeals involved an important question of federal law, and conflicted with decisions of the Court of Appeals for the District of Columbia and for the Fourth and Ninth Circuits. Certiorari was granted on October 9, 1961 (R. 121).

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals which holds that the District Court for the Eastern District of Pennsylvania had no power to transfer the instant case for improper venue because it lacked personal jurisdiction over the respondents, reads into Section 1406(a) of the Judicial Code a restriction: (1) which is not expressed in the statute or justified by its legislative history; (2) which is erroneously based upon the view that there is an inherent lack of power in the federal courts to take such action; and (3) which violates the purposes underlying the enactment of Section 1406(a) and the broad venue provisions of other statutes in connection with which Section 1406(a) would be used.

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3. The appeal was taken pursuant to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b). An earlier appeal was held to be improperly taken pursuant to Federal Rule of Civil Procedure 54(b) (R. 98-100), but the Court of Appeals afforded petitioner an opportunity to proceed under Section 1292(b). *Goldlawr, Inc. v. Heiman*, 273 F.2d 729 (R. 101-102).

ARGUMENT.

I.

The Decision of the Court of Appeals Imposes an Unwarranted Restriction Upon the Application of Section 1406(a).

Section 1406(a) of the Judicial Code is an important statutory procedural provision. Its proper application is essential to the efficient operation of the federal judicial system. In cases such as the present one, where venue has been laid in the wrong district, Section 1406(a), as amended,[4] authorizes the district court to dismiss the action or "in the interest of justice" to transfer the case to a district where venue is proper. Prior to the enactment of this provision in 1948, the court was required to dismiss the case.[5] Section 1406(a), by permitting the federal courts in a proper case to avoid the harsh result of dismissal, establishes a rule which is "in accord with modern standards of procedure, the purpose of which is to get away from time-consuming and justice-defeating technicalities."[6]

Section 1406(a) is a remedial statute and as such should be broadly construed.[7] In petitioner's view Section 1406(a) permits transfer, rather than dismissal, in all cases of improper venue where the district court has jurisdiction over the subject matter of the action, whether or not the court has acquired personal jurisdiction over the defendants

4. Section 1406(a), as originally enacted in 1948, merely authorized the district court to transfer an action in which venue was improperly laid. The 1949 amendment gave the district court discretion to *dismiss* or, in the interest of justice, to *transfer*.

5. *Camp v. Gress*, 250 U.S. 308, 316 (1919); *Schoen v. Mountain Producers Corp.*, 170 F.2d 707, 713 (3d Cir. 1948).

6. Chief Judge Parker in *Internatio-Rotterdam, Inc., v. Thomsen* 218 F.2d 514, 517 (4th Cir. 1955).

7. *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 504 (1871); *Lambur v. Yates*, 148 F.2d 137, 138 (8th Cir. 1945).

sought to be transferred. This is the holding of *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955); *Amerio Contact Plate Freezers, Inc. v. Knowles*, 274 F.2d 590 (D.C. Cir. 1960) [8] and *Hayes v. Livermont*, 279 F.2d 818 (D.C. Cir. 1960).[9] In all of these cases transfers were approved under section 1406(a) where venue had been laid in a wrong district, without regard to the existence in the transferor district court of personal jurisdiction over the transferred parties.

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8. The Court of Appeals for the Second Circuit refused to follow *Amerio* upon the ground that the Court of Appeals for the District of Columbia had misapplied the Second Circuit's own decision in *Schiller v. Mit-Clip Co.*, 180 F.2d 654 (1950) (288 F.2d at 584, R. 111-112). In the *Schiller* case, the Court of Appeals had dismissed an appeal from an order transferring a case under Section 1406(a), even though the transferor court did not have personal jurisdiction over the defendant. The majority opinion in the Court of Appeals herein stated that the defendant in *Schiller* had waived the jurisdictional defect and that the case therefore provides no basis for the holding in *Amerio* that a district court had power under Section 1406(a) to transfer a case without personal jurisdiction over the defendant.

The above analysis by the Court of Appeals herein would have merit only if the Court of Appeals for the District of Columbia had expressly stated, which it did not, that it was required to follow the decision of the Second Circuit in *Schiller*, irrespective of its own opinion in the matter. The holding in *Amerio*, however, represents the independent judgment of the Court of Appeals for the District of Columbia and the *Schiller* decision was correctly cited in support thereof. As Judge Hincks observed in his dissenting opinion, the Court of Appeals for the Second Circuit in *Schiller* "even if it did not pass upon the validity of a transfer made without personal jurisdiction, at least, allowed such a transfer to stand" (288 F.2d at 587, R. 117).

9. See also *Orion Shipping & Trading Co. v. United States*, 247 F.2d 755 (9th Cir. 1957); *Lumbermens Mut. Cas. Co. v. Mohr*, 87 F. Supp. 727 (S.D. Tex. 1949).

This is also the construction given Section 1406(a) by Professor James Moore, one of the drafters of the Judicial Code. 1 Moore, Federal Practice ¶ 0.146(5), p. 1910 at n. 21 (2d ed. 1960). The Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc.*, 286 F.2d 527 (1961) has taken the same position as the Court of Appeals herein.

The Court of Appeals herein has held that a district court cannot transfer a case for improper venue without possessing personal jurisdiction. This view is not justified by the legislative or other considerations set forth in that Court's opinion.

The sole restriction expressly placed by Congress upon the district court's exercise of its discretion to transfer under Section 1406(a) is that a case may be transferred only in the interest of justice. The requirement that, in addition, the district court have personal jurisdiction sought to be imposed by the Court of Appeals is neither found in the language of Section 1406(a) nor indicated as intended by the legislative history of the statute. Judge Hincks in his dissenting opinion observed that such a requirement is "wholly without Congressional sanction and reads into § 1406 a restriction on a salutary procedural provision which is not there. And a careful reading of its Congressional history does not suggest to me that such a restriction was intended" (288 F.2d at 589, R. 120).

The majority opinion of the Court of Appeals relied upon Senate Report No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949) as expressing "Congressional recognition" that personal jurisdiction was requisite to the application of Section 1406(a), although admitting that the document "does not explicitly address itself" to the issue (288 F.2d at 583, R. 109). This report recommended the passage of the 1949 amendment to Section 1406(a) permitting the district court to dismiss, as well as transfer, an action for improper venue, in order to avoid the abuses which could arise by allowing the court only to transfer such an action. The passage quoted in the opinion of the Court of Appeals cites as an example of such an abuse an instance where the plaintiff institutes suit in a district where defendant could be served but venue was improper so that transfer could be effected to a district where venue was proper but service not possible. It does not state that Section 1406(a) is applicable only in cases where the provi-

sion would be abused in this manner nor exclude its applicability in cases where no abuse can occur,[10] although personal jurisdiction is not acquired by the transferring court.

The Court of Appeals indicated that its holding was based upon an inherent lack of power in federal courts to affect the rights of parties without having first acquired personal jurisdiction over them. Federal courts, however, do have the power to act in a case (short of entering a final judgment) before acquiring personal jurisdiction in order to maintain the status quo. This power is exercised quite frequently in the issuance of *ex parte* restraining orders [11] at the commencement of an action in advance of service of process and was recognized as applicable to transfers pursuant to Section 1406(a) in *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514 (4th Cir. 1955). The Court of Appeals in that case rejected the contention that no transfer order can be entered until personal jurisdiction has been acquired, observing (218 F.2d at 516):

> This argument fails, however, to distinguish between acquiring jurisdiction over the proceedings commenced before the court and acquiring jurisdiction over person or property; and it is the former, not the latter, with which we are concerned here. Certainly the court has no power to enter judgment against person or property until process has been duly served, . . . but it by no means follows that it is without power to enter orders in the cause which are necessary to the maintenance of the litigation itself. . . .

The Court of Appeals for the Fourth Circuit expressly based its decision in *Internatio* on Section 1406(a). None-

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10. See discussion at pp. 10-11, *infra*.

11. Although now included in Federal Rule of Civil Procedure 65(b), the power of the federal courts to restrain a party before service of process is of judicial origin. *Georgia v. Brailsford*, 2 U.S. (2 Dal.) 402 (1792); *Irwin v. Dixon*, 50 U.S. (9 How.) 10 (1850).

theless, the Court of Appeals for the Second Circuit attempted to distinguish that case upon the ground that admiralty actions are governed by special rules, permitting the district court to act without personal jurisdiction. In the course of his opinion in *Internatio*, Chief Judge Parker had stated that since the mere filing of a libel in admiralty stops the running of the statute of limitations even without seizure of the ship, there was a quasi-jurisdiction in the transferor court to enter orders appropriate to the issuance of process, including the transfer of the case to a district where service of process could be effected. The Court of Appeals herein intimated that this was not true in civil cases other than in admiralty and pointed out that Judge Parker had in his opinion distinguished *Internatio* in this respect from "a civil action based on diversity of citizenship" (288 F.2d at 585, R. 113).

The present action is not a diversity case, but one founded upon the federal antitrust laws. Pursuant to Section 5(b) of the Clayton Act, as amended, 15 U.S.C. § 16(b), a cause of action under the antitrust laws is not barred if "commenced" within the specified time. A civil action is commenced in the federal courts by "filing a complaint with the Court",[12] and the running of the statute of limitations is stopped thereby even though there has been no service of process.[13] Therefore, a rule similar to that relied upon by Judge Parker in *Internatio* as justifying a district court to transfer a case without personal jurisdiction does apply to the present case and, hence, *Internatio* is not distinguishable from the present case for the reason given by the Court of Appeals below.

The interpretation of Section 1406(a) espoused by petitioner will not result in harassment of defendants or otherwise violate traditional notions of "fair play". No transfer will take place unless "in the interest of justice", and no

12. Federal Rule of Civil Procedure 3.

13. See cases cited in 2 Moore, Federal Practice ¶ 3.07(5), p. 787, at n. 4 (2d ed. 1960).

final judgment will be entered until personal jurisdiction is acquired by the transferee court. Preventing the transfer itself because of lack of personal jurisdiction does not add to such protections already afforded a defendant, but merely places an unwarranted obstacle in the path of the plaintiff. Furthermore, since the transferee court is required to obtain personal jurisdiction over a transferred party, Section 1406(a) cannot be abused under petitioner's interpretation for the purpose of curing defects in jurisdiction as well as venue.

The Court of Appeals further erred, we submit, by relying in part upon the cases interpreting Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a). Section 1404(a) is a codification of the common law doctrine of *forum non conveniens*, and in applying this doctrine it has been an historic requirement that the transferring court have personal jurisdiction over the defendant. In addition, Section 1404(a) permits transfer only when venue is proper—although inconvenient—and thus serves a totally different purpose than Section 1406(a). The cases under Section 1404(a), therefore, are not relevant to the interpretation of Section 1406(a).

We submit that the decision of the Court of Appeals imposes an unwarranted restriction upon the application of Section 1406(a) which is not supportable upon the grounds stated by the Court of Appeals in its opinion.

II.

The Restriction Imposed by the Court of Appeals Upon the Application of Section 1406(a) Is Unduly Burdensome.

The decision of the Court of Appeals nullifies the salutary purpose of Section 1406(a), by preventing its use in most of the instances where it would otherwise be applicable.

Under the general federal venue provisions, 28 U.S.C. §§ 1391(a) and (b), an action may be brought against an

individual defendant in the district where either the defendant or plaintiff resides. Since the residence of an individual can usually be determined without difficulty, any attempt to serve the defendant elsewhere would be a bad faith harassment of the defendant, and transfer would not be allowable "in the interest of justice", whether or not personal jurisdiction is acquired over the defendant.

Transfer should be permitted in those cases where determination of the proper district is difficult, and the plaintiff in good faith has made the wrong choice. This will occur most frequently in actions under the general [14] or special [15] venue, provisions in which Congress has expanded federal venue to permit suits against corporate defendants in any district where such defendant is "found" or "transacting business". Under these provisions the test for venue has become identical with the test for defendant's amenability to personal service. Therefore in any case where a court determines that venue has been improperly laid in

14. 28 U.S.C. § 1391(c).

15. In addition to Section 12 of the Clayton Act, 15 U.S.C. § 22, pursuant to which petitioner attempted to lay venue in the instant case, they are:

(a) 28 U.S.C. § 1395(a) (actions for recovery of fines, penalties or forfeitures).

(b) 28 U.S.C. § 1400(a) (actions under the Copyright Act).

(c) 15 U.S.C. § 77(v)(a) (actions under the Securities Act of 1933).

(d) 15 U.S.C. § 78aa (actions under the Securities Exchange Act of 1934).

(e) 15 U.S.C. § 79y (actions under the Public Utilities Companies Act).

(f) 15 U.S.C. § 80a-43 (actions under the Investment Companies Act).

(g) 15 U.S.C. § 1222 (actions under the Automobile Dealers Franchise Act).

(h) 29 U.S.C. § 160(e), (f), (j) (actions under the Taft-Hartley Act).

(i) 45 U.S.C. § 56 (actions under the Federal Employers' Liability Act).

reliance of one of these provisions, by necessity, personal jurisdiction will also be lacking.

Because of the problem of judicial definition of what activities constitute "doing business", it is not unlikely that a plaintiff may commence suit in a district with which he honestly, but incorrectly, believes the defendant has sufficient contacts to support venue and personal jurisdiction. In such a case the district court may make its determination adversely to the plaintiff only after a time-consuming inquiry into the defendant's activities, during which time the statute of limitations will have run, preventing a new action or barring recovery of a considerable portion of the damages. The decision of the Court of Appeals herein would require such case to be dismissed, leaving the plaintiff remediless, even though the district court determined that it was in the interest of justice to transfer to a district where venue was proper.

This result is particularly harmful, since actions instituted pursuant to statutes containing such expanded venue provisions constitute an important segment of federal litigation, both in amount and character. For the most part, such actions fall into areas where there is a Congressional policy to encourage and facilitate Government and private suits. It is submitted that by making Section 1406(a) inapplicable to these cases, the decision of the Court of Appeals herein imposes an undue restriction upon the scope of this provision.

The hardship such a decision can cause a plaintiff is illustrated in the instant case. Petitioner's complaint was filed in the Eastern District of Pennsylvania within one year of the entry of a Consent Decree in a Government suit alleging similar antitrust violations thereby entitling petitioner to the benefit of the tolling of the statute of limitations under Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b). Through no fault of the petitioner, however, the District Court's decision that venue was improper with respect to respondents was not rendered until after two years

had elapsed. By that time the larger part of the petitioner's claim was barred by the statute of limitations and, unless the transfer is sustained under Section 1406(a), will be unrecoverable without regard to the merits of such claim.

Petitioner's good faith in instituting the action in the Eastern District of Pennsylvania is demonstrated by the fact that the District Court upheld petitioner's contentions that some of New York's defendants were doing business through agents in Philadelphia, and only rejected them with respect to respondents after an extended study of the facts. Moreover, as Judge Hincks noted in his dissent (288 F.2d at 589, R. 119), there was nothing improper in the petitioner's attempting to prosecute its claim against all of the defendants in one action in its home forum.

It is submitted that in the light of this good faith and the liberal policy of Section 1406(a), the District Court for the Eastern District of Pennsylvania correctly decided that it was "in the interest of justice" to transfer the present action in order to avoid the elimination of a significant period of damages.[16] Neither respondents nor the courts below have questioned the propriety of the transfer on this ground.

The dismissal of petitioner's action, under these circumstances, is also contrary to Congressional policy, as demonstrated by liberal venue [17] and tolling [18] provisions, to facilitate the private antitrust suitor's prosecution of his claim against alleged antitrust violators. This Court has stated, *Radovich v. National Football League*, 352 U.S. 445, 454, that: "in the face of such policy this Court should not add requirements to burden the private litigant beyond

16. This view was expressed by Judge Hincks in his dissenting opinion. 288 F.2d at 589, R. 119. See also *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514, 517 (4th Cir. 1955); *Gold v. Griffith*, 190 F. Supp. 482 (N.D. Ind. 1960); 1 Moore Federal Practice ¶ 0.146(5), p. 1908, at n. 11 (2d ed. 1960).

17. Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22.

18. Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b).

what is specifically set forth by Congress in those [antitrust] laws." The decision of the Court of Appeals herein, by depriving private antitrust litigants of the procedural benefits of Section 1406(a) as a matter of law, unduly burdens such suitors without express Congressional authority.

A view more consistent with the liberal policies of both the antitrust laws and Section 1406(a) is expressed by Judge Hincks, who pointed out that avoidance of the elimination of a significant period of damages was in itself a reason "in the interest of justice" why the transfer should have been found proper (288 F.2d at 589, R. 119).[18]

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals affirming the dismissal of the transferred action as to respondents by the District Court for the Southern District of New York should be reversed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, for Respondent Marcus Heiman

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Statement of the Case 2

ARGUMENT:

POINT I.—Petitioner voluntarily has stated to this Court that it is not seeking a review of the denial of its motions to substitute the Executors as party defendants. Accordingly the dismissals below must stand. The controversy before the Court is moot as to Marcus Heiman. As to him the writ of certiorari should be dismissed or the judgment below affirmed 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 101

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

Brief of Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased, for Respondent Marcus Heiman

Question Presented

By virtue of the limited question presented for review by petitioner (Brief for Petitioner, pp. 2-3) and by virtue of petitioner's voluntary statement that it is not seeking a review of the denial of its motions to substitute the Morgan Guaranty Trust Company of New York, Executor, as party defendant in place of Marcus Heiman, deceased (Brief for Petitioner, p. 4, n. 2), the question presented with respect to respondent Marcus Heiman is—

> Should this Court either dismiss the writ of certiorari or affirm the judgment below as to Marcus Heiman because the proceeding is "moot" as to Marcus Heiman?[1]

[1] Rule 23, para. 1(c) of the Rules of this Court provides: "Only the questions set forth in the petition or fairly comprised therein will be considered by the Court."

Statement of the Case

The affirmance below was unanimous with respect to respondent Marcus Heiman (R. 115).

Petitioner filed its first complaint in the United States District Court for the Eastern District of Pennsylvania on October 17, 1956 (R. 1). Marcus Heiman died a resident and domiciliary of New York, New York on September 9, 1957. Morgan Guaranty Trust Company of New York and Asher Levy were issued letters testamentary by the Surrogate's Court of the County of New York, State of New York on October 1, 1957 (R. 70-72).[2]

Petitioner had knowledge of the death of Marcus Heiman almost immediately and was informed officially in January, 1958 (R. 80). Petitioner did not proceed to substitute the Executors in place of the decedent until some twenty (20) months after the death of Marcus Heiman and only *after* the transfer of the actions to the United States District Court for the Southern District of New York (R. 59; 71; 80).

On March 3, 1959, the date the United States District Court for the Eastern District of Pennsylvania ordered the actions transferred to the Southern District of New York, Marcus Heiman had been dead almost eighteen (18) months; the Executors had not been substituted as party defendants; there had been no appearance by the Estate of Marcus Heiman; no Court had acquired jurisdiction over Marcus Heiman or over the Executors; neither had been served personally with process; neither had submitted to the jurisdiction of the Court (R. 64-65); and the Eastern District Court had held that Marcus Heiman

[2] By intermediate decree of the Surrogate's Court dated June 15, 1960, Asher Levy was permitted to resign. Morgan Guaranty Trust Company of New York has continued as Executor.

neither resided, was not found, nor had an agent in Pennsylvania, and had held venue there improper as to him (R. 26-29). *Goldlawr, Inc.* v. *Shubert*, 169 F. Supp. 677, 679-682.

On two separate occasions, in October, 1956 and in February, 1957, petitioner directed the United States Marshal in Philadelphia to serve Marcus Heiman in Philadelphia by serving a woman in charge of the Shubert office at the Forrest Theatre at 209 Quince Street, Philadelphia, Pennsylvania (R. 19; appendix, p. 16, *infra*).[3] On the second occasion petitioner *at the same time* directed the United States Marshal in New York to serve an alias summons upon respondent, United Booking Office, Inc., of which Marcus Heiman was a Director, by serving Marcus Heiman at his business, 236 West 44th Street, New York, New York, or at his home 24 West 55th Street, New York, New York (R. 81-82).

In opposing the motions made on behalf of Marcus Heiman (as well as those made on behalf of the other defendants, including the present corporate respondents) to quash service and to dismiss for lack of jurisdiction

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[3] The motions on behalf of Marcus Heiman to quash service and to dismiss in connection with the October, 1956 return of service were filed November 26, 1956 (R. 1). The affidavit of Marcus Heiman, sworn to November 19, 1956 in support thereof stated: "* * * The Forrest Theatre offices on Quince Street, Philadelphia, are not my offices * * *" (R. 76-77).

Petitioner conceded below that this Philadelphia office was not the office of Marcus Heiman but was "the headquarters of the Shubert organization" (R. 81). See also Brief for Petitioner, p. 5: "Service was originally made upon all defendants at the Shubert's Philadelphia office". Marcus Heiman was not a Shubert. The purported service was not effective.

Petitioner has never at any time really contended that jurisdiction over Marcus Heiman was obtained (See R. 72—no opposition before the Eastern District Court; R. 94—letter to Judge Kraft; R. 107—no opposition below).

and for improper venue, petitioner made no effort whatsoever to sustain the purported service upon Marcus Heiman at Philadelphia or to sustain the Eastern District of Pennsylvania as a proper venue for him (R. 72). Although petitioner offered a voluminous affidavit, brief and voluminous documents in opposition to the motions, not one word was offered by petitioner to support the venue as to Marcus Heiman or the purported services upon him (R. 72).[4]

On December 22, 1958 Judge Kraft filed an opinion in both actions granting the motions of Marcus Heiman to dismiss for improper venue (R. 3; 8). *Goldlawr Inc.* v. *Shubert*, 169 F. Supp. 677, 679-682. On March 3, 1959 Judge Kraft, instead of dismissing the actions pursuant to his opinion, transferred the actions to the United States District Court for the Southern District of New York without having ruled upon the motions of Marcus Heiman to dismiss for lack of personal jurisdiction or without having substituted the Executors as party defendants (R. 46; 61, 64-65).

After transfer to the Southern District of New York, petitioner served notices of motion dated May 11, 1959 upon the Executors to substitute them as party defendants in place of Marcus Heiman (R. 59). The Executors appeared to oppose the motions for substitution and by notice of motion dated June 4, 1959 cross-moved for the dismissal of the actions (R. 68-82).

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[4] Had petitioner originally instituted the actions against Marcus Heiman (as well as against many of the other defendants) in New York, much of what has transpired would have been voided. No question has ever been raised as to Marcus Heiman not being amenable to process in New York prior to his death. Note also that petitioner's several complaints allege in substance that the center of the alleged conspiracy was in New York and that it was from there that the alleged injuries were allegedly inflicted (R. 15-17; R. 21-25; R. 47-53; R. 53-59).

The Southern District Court *denied* the motions for substitution and granted the Executors' motion to dismiss (R. 64-67; 97).[5] The Court of Appeals for the Second Circuit unanimously affirmed the order as to Marcus Heiman (R. 115; 121). Petitioner is not seeking a review of the holding that the Executors cannot be substituted (Brief for Petitioner, p. 4, n. 2).

Immediately after the dismissal below petitioner instituted a new action on August 20, 1959 naming as defendants the Executors of the Estate of Marcus Heiman and the two corporate respondents (Civil Action 149-349, United States District Court for the Southern District of New York).[6]

ARGUMENT

POINT I

Petitioner voluntarily has stated to this Court that it is not seeking a review of the denial of its motions to substitute the Executors as party defendants. Accordingly the dismissals below must stand. The controversy before the Court is moot as to Marcus Heiman. As to him the writ of certiorari should be dismissed or the judgment below affirmed.

Even should this Court hold that the District Court for the Eastern District of Pennsylvania had the power to transfer under 28 U. S. C. §1406(a), without having obtained personal jurisdiction over the respondents, the actions below were properly dismissed as to Marcus Hei-

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[5] "* * * it is hereby ordered and decreed: * * * That the motion of the Executors . . . to dismiss as to Marcus Heiman . . . is granted, and that the motion of plaintiff to substitute the Executors . . . as party defendants in place of Marcus Heiman be denied."

[6] Petitioner could have brought this action almost two years earlier.

man. As to him there was no substitution of proper parties; the Courts below denied petitioner's application for substitution pursuant to Rule 25(a)(1) of Federal R. Civ. Proc.; petitioner has acquiesced in said rulings and has affirmatively abandoned any review thereof.

In its petition for a writ of certiorari, petitioner limited its request for review to a single question—namely:

> "Did the District Court for the Eastern District of Pennsylvania, which had jurisdiction over the subject matter of the present action, have the power to transfer the case for improper venue under 28 U. S. C. §1406(a), without having obtained personal jurisdiction over the transferred respondents?"

Petitioner did not request a review of the denial of its motions for substitution. In addition, no argument was set forth in its petition with respect thereto. Accordingly, in opposing the petition, Morgan Guaranty Trust Company of New York as Executor, on behalf of Marcus Heiman argued that the petition should be denied as to Marcus Heiman since as to him the controversy was moot.

Any doubt that this Court may have entertained as to the controversy being moot must now be positively dispelled by petitioner's admissions subsequent to the granting of certiorari.

Petitioner again fails to present any argument in its brief with respect to the issue of substitution; nor does it deny that the controversy is moot as to Marcus Heiman, as was argued in opposition to the petition; further, petitioner expressly states to this Court:

> "• • • they (the Courts below) also held that the said Executors could not be substituted pursuant to the Federal Rules of Civil Procedure 25(a)(1).

> Petitioner did not seek review of this latter holding." (Brief for Petitioner, p. 4, n. 2.)

The propriety of the denial of the motions for substitution has not been presented to the Court and, accordingly, is not before it for review. Supreme Court Rules 23, para. 1(c); *Phillips Co.* v. *Dumas School District*, 361 U. S. 376, 386 (n. 12); *Carpenters' Union* v. *Labor Board*, 357 U. S. 93, 96-97 (n. 1); *Lawn* v. *United States*, 355 U. S. 339, 362-363 (n. 16); *Irvine* v. *California*, 347 U. S. 128, 129-130; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48.

Because the Courts below have denied the substitution of the Executors, the dismissals below must stand. Rule 25(a)(1) of the Federal Rules of Civil Procedure is clear and explicit:

> "If a party dies and the claim is not thereby extinguished,[7] the Court within two years after the death *may order* substitution of the proper parties. *If substitution is not so made, the action shall be dismissed as to the deceased party* * * *"[8] (emphasis ours)

By not seeking a review of the denial of its motions for substitution and by having affirmatively acquiesced in said

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[7] Although not passed upon below, the Executor does not concede that the claim at bar survived. In view of petitioner's position, no argument is being presented with respect thereto.

The question as to whether a claim (such as at bar) made in a private anti-trust action for treble damages under 15 U. S. C. §1 *et seq.*, is extinguished, has never been passed upon by this Court. The trend of lower Court decisions has been to hold that the claim has not been extinguished but to disallow treble damages. See *Banana Distributors, Inc.* v. *United Fruit Co.*, ... F. Supp. ...., 1961 CCH Trade cases ¶69,973 (S. D. N. Y. 1961).

[8] Even within the two year period, substitution is not an absolute right. *Anderson* v. *Yungkau*, 329 U. S. 482, 485-486.

ruling, petitioner has caused the controversy between it and respondent Marcus Heiman to end. The issue as to whether the Eastern District Court had the power to transfer without having had personal jurisdiction of the respondents is no longer material to the disposition of the controversy between petitioner and Marcus Heiman. An opinion by this Court on the question presented by petitioner for review cannot affect the controversy that once existed. The matter before the Court as to respondent Marcus Heiman is moot. *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 367; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416, 418; *Automatic Radio Co.* v. *Hazeltine Research*, 339 U. S. 827, 835-836; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Atherton Mills* v. *Johnson*, 259 U. S. 13; *American Book Co.* v. *Kansas*, 193 U. S. 49; *Mills* v. *Green*, 159 U. S. 651, 653-654; *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696; *Cover* v. *Schwartz*, 2 Cir., 135 F. 2d 541, *cert. denied* 319 U. S. 748.

As to Marcus Heiman the writ of certiorari should be dismissed,[9] or in the alternative the judgment below affirmed.

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[9] It is not unusual for this Court to dismiss a writ of certiorari as having been improvidently granted. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 77-80 *and particularly* n. 2 at pp. 78-79; See also *Phillips* v. *New York*, 362 U. S. 456; *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U. S. 231.

POINT II

The transfers violated traditional concepts of due process and were not in the interest of justice.[10]

The orders of transfer had an important and substantial affect on the rights of the parties to the actions and on the rights of the Estate of Marcus Heiman. The extent to which, or the period of time for which the Estate of Marcus Heiman was to be exposed to a claim for damages involved a serious question affecting the orderly and expeditious administration of the Estate. "Cf." *Anderson* v. *Yungkau*, 329 U. S. 482, 485-486.[11]

Yet, at the time the motions for transfer were made, argued and decided the Estate of Marcus Heiman was not before the Court. The Executors had not been substituted, were not parties to the actions, and were not given the opportunity to be heard and to argue that the transfers would not be in the interest of justice. No papers of any nature had been served upon them. Such a procedure cannot be sustained.

The opinion of the Court of Appeals For the Third Circuit in *Hohensee* v. *News Syndicate Inc.*, 286 F. 2d 527 at 530 is most applicable—

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[10] At the outset it should be noted that Judge Hincks agreed that the order below as to Marcus Heiman should be affirmed (R. 115). It should be further noted that any discussion of Section 12 of the Clayton Act, 15 U. S. C. §22 (R. 118) has no relevance to the transfer as to Marcus Heiman and that the dissent of Judge Hincks as well as a substantial part of petitioner's argument if not all of it are directed to sustaining the transfer as to the corporate respondents only.

[11] The real issue at bar is, "the elimination of a significant period of damages." Brief for petitioner, pp. 13-14. Thus the orders of transfer were not simply a preliminary procedural device necessary to the maintenance of the litigation itself". *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F. 2d 514, 516, Parker C. J.

> "We think that a close reading of the section (28 U. S. C. §1406(a)) will make it clear that it is available to a plaintiff only where the court has jurisdiction over the person of the defendant. Subsection (a) provides that venue can be perfected by a transfer to another forum only if it be determined that it is in the 'interest of justice' to do so. *Before such determination can be made, however, both parties of necessity must at least have an opportunity to be heard.*" [12] (Emphasis added.)

The death of Marcus Heiman on September 9, 1957 terminated his limited presence before the Court. The Court could not proceed without the substitution of proper parties. *Ex Parte Slater*, 246 U. S. 128.[13] *Clarke* v. *Mathewson*, 12 Pet. 164, 171 (U. S. 1838); *Commonwealth* v. *Pladas*, 79 D & C 235 (Pa. 1952); *O'Brien* v. *Flynn*, 228 App. Div. 704, 239 N. Y. S. 59; 1 AM. JUR., Abatement and Revival, §159, p. 105 (1936); the attorney who had acted for Marcus Heiman during his lifetime no longer

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[12] The attempted analogy by petitioner of the *ex parte* restraining order (Brief for petitioner, p. 9) is readily distinguishable. Such an order is effective for a limited period of time *only* after service upon the party to be affected, who has an opportunity to appear before the issuing court, oppose it and move to have it dissolved. At bar the order of transfer was effective immediately without service upon the Executors, upon whom no papers of any nature were served. If petitioner's position at bar is sustained by this Court, thereby permitting transfer without jurisdiction, such a party as the Executor at bar would be foreclosed forever from opposing the transfer. It is very doubtful that after such a decision by this Court that a transferee court would ever review the propriety of the transfer to determine whether the transferor court, a court of coordinate jurisdiction, in the exercise of its discretion transferred "in the interest of justice".

[13] At 246 U. S. 133, ". . . The death of one of the parties having an interest in the fund operated to suspend the proceedings for its apportionment until someone legally capable of asserting and defending that interest should either come or be brought into the suit in the place of the deceased."

represented the decedent. *Eagleton Mfg. Co.* v. *West*, 2 Fed. 774, 779 (C. C. S. D. N. Y. 1880); *Hart* v. *Blabey*, 286 N. Y. 75, 39 N. E. 2d 230.

Petitioner argues that its position must be sustained in order to preserve the efficient operation of the federal judicial system (Brief for Petitioner, p. 6). Yet, petitioner's own conduct in proceeding with this litigation as to Marcus Heiman has been the very opposite of efficient.[14] The record shows that petitioner had no reasonable basis for believing that it could effect proper service on Marcus Heiman within the jurisdiction of the Eastern District Court of Pennsylvania and for believing that venue there was proper as to him.

Even by petitioner's own standards the transfer as to Marcus Heiman was not in the interest of justice.[15] The record shows that petitioner knew Marcus Heiman resided in New York, knew that his business was there and knew that the Shubert office in Philadelphia was not

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[14] Petitioner claims also that it has acted in good faith and is prejudiced by the dismissal because a large part of its claim would be barred by the statute of limitations through no fault of its own (Brief for Petitioner, pp. 13-14). The issue as to whether petitioner instituted these actions as to Marcus Heiman and prosecuted them in good faith was not reached below although argued by the Executor (Brief for Morgan Guaranty Trust Company of New York, as Executor, in the Court of Appeals, Point III). The discussion of petitioner's good faith by Judge Hincks (R. 119) has no applicability to Marcus Heiman as His Honor was dissenting as to the corporate respondents only (R. 115).

[15] "Since the residence of an individual can usually be determined without difficulty, any attempt to serve the defendant elsewhere would be a bad faith harassment of the defendant, and transfer would not be allowable 'in the interest of justice', whether or not personal jurisdiction is acquired over the defendant.

"Transfer should be permitted in those cases where determination of the proper district is difficult, and the plaintiff in good faith has made the wrong choice" (Brief for Petitioner, p. 12).

Heiman's office. Notwithstanding, petitioner on two separate occasions directed service to be made on Marcus Heiman by serving the woman in charge of the Shubert office in Philadelphia. On the second occasion petitioner at the same time directed the Marshal in New York to serve an alias summons on respondent, United Booking Office, Inc., by serving Marcus Heiman at his home or at his business in New York (p. 3, *supra*).

The most cogent evidence, however, of petitioner's bad faith in instituting these actions as to Marcus Heiman in the Eastern District of Pennsylvania is petitioner's complete failure to offer one fact or one argument to the Eastern District Court to sustain venue or jurisdiction as to Marcus Heiman. Petitioner in opposing the motions of all the defendants to quash service, and to dismiss for lack of jurisdiction and for improper venue submitted a thirty-two page affidavit by its attorney, a twelve page brief and voluminous documents and exhibits. Not one word referred to Marcus Heiman or to the claim that the Court had jurisdiction over him and that venue was proper as to him.

Petitioner argues that it should not be prejudiced by the two years which elapsed between argument and the decision in the Eastern District Court. As to Marcus Heiman petitioner was never prejudiced by this delay since petitioner in effect offered no opposition to the motions made on his behalf. Having not even attempted to sustain jurisdiction and venue as to Heiman, petitioner could have expected only one result—namely dismissal as to Heiman.[16]

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[16] "Cf." *Skilling* v. *Funk Aircraft Company*, 173 F. Supp. 939 (W. D. Mo. 1959). Held: It was not in the interest of justice to transfer even for the purpose of interrupting the running of the Statute of Limitations where plaintiff merely assumed he could obtain service on the defendant in the District.

This foregoing conduct of petitioner together with its unexcusable and unreasonable delay in moving to substitute the Executors,[17] can leave no doubt that the judgment of dismissal below as to Marcus Heiman was proper.

Morgan Guaranty Trust Company of New York as Executor in further urging the affirmance of the judgment below also joins in the argument presented by the corporate respondents, namely—

> that section 1406(a) must be construed strictly, *Hoffman* v. *Blaski*, 363 U. S. 335; that the decisions below and that of the Court of Appeals for the Third Circuit in *Hohensee* v. *News Syndicate Inc.*, 286 F. 2d 527, are supported by the legislative history of Section 1406(a) and by the obvious intent of Congress to make personal jurisdiction the *sine qua non* of transfers under both Sections 1404 and 1406 (28 U. S. C. §§1404, 1406); that these decisions are not unwarrantedly restrictive or burdensome on litigants; and that the decisions relied upon by petitioner are distinguishable and inapplicable.

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[17] On the death of Marcus Heiman, the burden of substituting the proper party rested on petitioner. *Winkelman* v. *General Motors*, 30 F. Supp. 112, 113 (S. D. N. Y.); 1 C. J. S., Abatement and Revival §161, Suppl. p. 33, n. 97.1 (1961).

CONCLUSION

The writ of certiorari should be dismissed as the controversy before the Court as to Marcus Heiman is moot. In the alternative the judgment below should be affirmed.

Respectfully submitted,

AARON LIPPER,
Counsel for Morgan Guaranty Trust Company of New York, Executor of the Estate of Marcus Heiman, Deceased,

RICHARD B. DANNENBERG,
WALTER J. KEELEY,
LIPPER, SHINN & KEELEY,
Of Counsel.

APPENDIX

Summons and Return in Goldlawr, Inc. v. Jacob J. Shubert, et al., E. D. Pa. No. 22,092 omitted from transcript of record by inadvertence; found at pages 11 and 18 of the Record on Appeal of Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

..... DIVISION

Civil Action File No. 22,092

GOLDLAWR, INCORPORATED,

Plaintiff,

v.

JACOB J. SHUBERT and LAWRENCE SHUBERT LAWRENCE, MILTON SHUBERT, WILLIAM KLEIN and SYLVIA W. GOLDE, individually and as Trustees of the Estate of LEE SHUBERT, Deceased, individually and as co-partners, JOHN SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, SELECT OPERATING CORPORATION, MODERN THEATRE CORPORATION, BARRYMORE THEATRE CORPORATION and L. A. B. AMUSEMENT CORPORATION,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Harold E. Kohn, Esq., plaintiff's attorney, whose address is 2035 Fidelity Philadelphia Trust Bldg., Philadelphia 9,

Pa., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Gilbert W. Ludwig, Clerk of Court.
Roland J. Greenwood, Deputy Clerk.

[Seal of Court]

Date: February 18, 1957

[Stamp—Dept. of Justice—Received Feb. 19, 1957—U. S. Marshal, Phil., Pa.]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 5th day of March 1957, I received this summons and served it together with the complaint herein as follows:

on 3-5, 1957, upon Marcus Heiman ~~personally~~, at 209 So. Quince St., Phila, Pa by handing ~~him~~ her ~~or them~~ copies thereof, and making contents of said service known to ~~him~~ her ~~or them~~; or on 3-5, 1957 upon Mrs. C. E. Richman woman in charge of the office of the place of business designated by Plaintiffs attorney for service upon him.

Marshalls Fees:

Travel	$....
Service	$2.00
	$2.00

William A. O'Brien, U. S. Marshal, E. D. of Pa. By:
Thomas J. Hasson, Deputy U. S. Marshal
Filed March 11, 1957